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In the Matter of

MAR 24 2004

Amendment of Section 73.202(b),

Federal Communications Commission MB Docket No 02-136

Table of Allotments,

Office of the Secretary

FM Broadcast Stations

(Arlington, The Dalles, Moro, Fossil, Astoria,

Gladstone, Tillamook, Springfield-Eugene,

Coos Bay, Manzanita and Hermiston, Oregon

and Covington, Trout Lake, Shoreline, Bellingham,

Forks, Hoquiam, Aberdeen, Walla Walla, Kent,

College Place, Long Beach and Ilwaco, Washington)

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Federal Communications Commission
Office of the Secretary

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To Assistant Chief, Audio Division, Media Bureau

MAR 24 2004

Federal Communications Commission
Office of the Secretary

RESPONSE TO "REQUEST FOR EXPEDITED ACTION"

Triple Bogey, LLC; MCC Radio, LLC ("MCC") and KDUX Acquisition, LLC (collectively "Triple Bogey") herein respond to the pleading styled "Opposition to Motion for Leave to File Supplement, and Request for Expedited Action" (hereinafter "Request") filed March 3, 2004, by Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), First Broadcasting Company, L.P. and Saga Broadcasting, LLC ("Saga") (collectively "First Broadcasting").

First Broadcasting's March 3 pleading opposes the "Motion for Leave to File Supplement to Petition to Deny [sic]" filed February 12, 2004, by Mercer Island School District ("MISD"), licensee of Class D Station KMIH(FM).

Had First Broadcasting's Request stuck to the point (*i.e.*, whether MISD's Supplement should be accepted), it would be unremarkable and require no further comment by Triple Bogey. First Broadcasting, however, did not stick to the point. Instead, First Broadcasting used the Request to re-argue an issue already fully briefed – *i.e.* whether, under the Commission's *Taccoa* policy,¹ First Broadcasting's counterproposal to its own original proposal should be dismissed.

In an attempt to justify the filing of its Request, First Broadcasting points to a January 5, 2004, letter from a Canadian official to the FCC. But, as discussed below, the January 5 letter, which contains a tentative offer to enter into bilateral negotiations regarding the use of terrain shielding, in no way justifies First Broadcasting's filing, some 17 months previously, of its counterproposal to its own proposal.

Background. On October 29, 2001, First Broadcasting filed a petition for rulemaking (hereinafter "Original Proposal") proposing that Station KMCQ, Channel 283C, The Dalles, Oregon, of which Mid-Columbia is the licensee, be downgraded to Channel 283C3 and reallocated to Covington, Washington. Further allotment changes also were proposed. On June 7, 2002, the Commission released a *Notice of Proposed Rule Making* in this proceeding (DA 02-1339), which set July 29, 2002, as the deadline for comments and counterproposals. On that date, First Broadcasting abandoned its Original Proposal and presented a new allotment plan in which it asked that KMCQ be downgraded to Channel 283C2 and reallocated to Kent, Washington, instead of Covington (hereinafter "Amended Proposal"). To accommodate the allotment of Channel 283C2 at Kent, Station KAFE(FM), Bellingham, Washington, of which Saga is the licensee, would change

¹ *Taccoa, Sugarhill and Lawrenceville, Georgia*, 16 FCC Rcd 21,191 (Chief, Allocations Branch 2001)

frequency from Channel 282C to Channel 281C.² Operating on Channel 281C from its current transmitter site, KAFE would be short-spaced to two vacant Canadian allotments.³ To address that situation, First Broadcasting requested that the FCC, in accordance with standard treaty procedures, ask the Canadian government to change the channel of one of the vacant allotments and to waive the short-spacing with respect to the other.⁴

If Canada were to grant First Broadcasting's allotment modification and waiver request, Station KAFE could operate on Channel 281C without reducing power in the direction of these allotments. But, recognizing the proposed rearrangement of Canadian allotments might not be effectuated, First Broadcasting and Saga pledged that KAFE can and will operate with a directional antenna to afford those allotments the protection required. Amended Proposal at pp. 11-12.⁵

² Additionally, Station KLLM(FM), Forks, Washington, would be changed from Channel 280A to Channel 288A

³ Specifically, Channel 280A at Powell River, British Columbia, and Channel 281A at Bralorne, British Columbia.

⁴ First Broadcasting proposed that Channel 291B be substituted for Channel 280A at Powell River. With respect to the Bralorne allotment, First Broadcasting asserted that due to terrain blockage, no actual interference will occur to a facility operating on Channel 281A at Bralorne.

⁵ On the deadline for counterproposals, Triple Bogey presented an allotment plan requesting, *inter alia*, that Station KDUX-FM, of which MCC is the licensee, change from Channel 284C2 to Channel 283C2 and be reallocated from Aberdeen, Washington, to Shoreline, Washington. To accommodate that change, Triple Bogey also requested, *inter alia*, that the frequency of Station KAFE be changed from Channel 282C to Channel 281C. As did First Broadcasting, Triple Bogey noted that KAFE may need to reduce power slightly in the direction of two vacant Canadian allotments. But studies prepared by consulting engineering firm Hatfield & Dawson, which Triple Bogey submitted with its counterproposal, demonstrate that KAFE, operating with such a directional antenna, would suffer no reduction in United States area or population within its 60 dBu or 70 dBu contours

Other parties also filed timely counterproposals. Those allotment plans have no direct bearing on the matter at hand and thus require no discussion here.

On August 13, 2002, Triple Bogey filed a “Motion to Sever Counterproposal.” Therein Triple Bogey, citing *Taccoa*, requested that First Broadcasting’s Amended Proposal be severed from the proceeding and, if Triple Bogey’s proposal is adopted, be dismissed. First Broadcasting filed an Opposition on August 28, 2002, to which Triple Bogey replied on September 10, 2002.

In a Public Notice released March 10, 2003 (Report No. 2599), the Commission solicited further reply comments with respect to, *inter alia*, First Broadcasting’s Amended Proposal and Triple Bogey’s proposal. Triple Bogey and First Broadcasting each filed Reply Comments on March 25, 2003.

In its Reply Comments Triple Bogey argued, *inter alia*, that First Broadcasting’s counterproposal to its own Original Proposal must be dismissed under the Commission’s *Taccoa* policy. Triple Bogey responded to First Broadcasting’s claim that “unforeseen circumstances” justified the filing of its Amended Proposal. First Broadcasting had stated it could not have filed its Amended Proposal as an initial petition for rulemaking because it had not been able to reach a favorable resolution with Saga, the KAFE licensee, regarding the Canadian spacing issues discussed above. First Broadcasting claimed that subsequent to the filing of its Original Proposal, “significant changes to the regulatory landscape” made it appear that changes in the Canadian allotments could be obtained. *See* First Broadcasting Amended Proposal at p. 2.

But, as Triple Bogey pointed out in its Reply Comments, the only actual changes in circumstances were that (a) on the day First Broadcasting’s Amended Proposal was filed with the FCC, First Broadcasting’s Canadian consulting engineer presented its Powell River/Bralorne plan to Industry Canada and (b) Saga and First Broadcasting entered into an “exclusive” arrangement under which Saga agreed to cooperate with First Broadcasting – even if it means operating KAFE

with a directional antenna – in exchange for First Broadcasting paying Saga an unstated sum in excess of the costs incurred in modifying KAFE’s facilities. *See* Saga Reply Comments, filed August 13, 2002 at pp 4-5. Recognizing that Canada very well may opt not to adopt First Broadcasting’s channel allotment plan, the Amended Proposal presented, as an alternative, that KAFE use a directional antenna to protect the Canadian allotments. Of course, that alternative was always available, use of a directional antenna to protect short-spaced Canadian allotments is specifically contemplated in the treaty between Canada and the United States and is a common practice.⁶

Triple Bogey concluded that, except for the fact First Broadcasting and Saga had not yet finalized their “exclusive” agreement, nothing prevented First Broadcasting from submitting its Amended Proposal at the time its Original Proposal was submitted. The subsequent business decision on the part of First Broadcasting and Saga to effectuate their exclusive agreement did not justify First Broadcasting filing a counterproposal to its own proposal. As a result, First Broadcasting’s Amended Proposal should be dismissed.

Predictably, First Broadcasting filed a further pleading, styled a “Supplement,” on April 28, 2003, in which it responded to Triple Bogey’s *Taccoa* argument. Triple Bogey filed a “Reply to Supplement” on May 21, 2003.

Now in its March 3, 2004, Response, First Broadcasting cites a letter dated January 5, 2004, from Paul Vaccani, Director, Broadcast Applications Engineering, Broadcasting Regulatory Branch, of Industry Canada to Kathryn O’Brien, Chief, Strategic Analysis and Negotiations Division of the

⁶ *See* citations set forth in Triple Bogey’s Reply Comments, filed March 25, 2003, at n. 11.

FCC, as justification for filing, some 17 months previously, a counterproposal to its own proposal.⁷

The January 5 letter states that the “Department” had been approached by representatives of KAFE “in regards to assigning unlimited Class C status to the proposed Channel 281.” The letter continues:

Although terrain is not usually considered for protection purposes internationally, we would in this instance be prepared to consider such protection and other issues in this case only, should the Commission wish to pursue this further. However, please be advised that the Department will in the very near future be submitting a notification for a new allotment on Channel 292 in Vancouver, BC and would expect some reciprocity in regards to considering similar terrain protections to Channel 293C in Lynden, Washington.

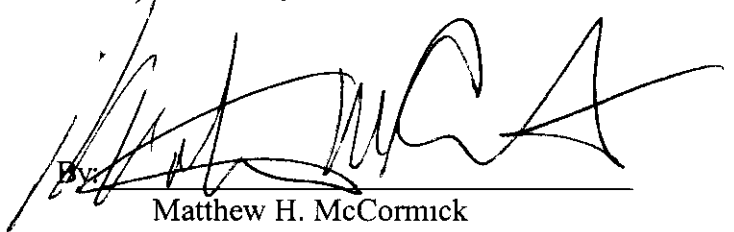
Discussion. Industry Canada’s January 5 letter does not reflect “significant changes to the regulatory landscape,” as First Broadcasting previously has claimed justified the filing of its Amended Proposal. At most, the January 5 letter reflects a tentative offer by Industry Canada, in response to a specific request from “representatives of KAFE(FM),” to enter into negotiations with the United States to consider terrain shielding “in this case only,” provided the United States similarly considers terrain shielding with respect to a possible new allotment at Vancouver, B.C. Significantly, First Broadcasting has presented nothing to indicate that the FCC is willing to consider terrain shielding with respect to the Vancouver, B.C., proposal.

⁷ First Broadcasting’s Response also includes a letter dated February 26, 2004, from First Broadcasting’s Canadian attorney, Stephen B. Acker. Mr. Acker’s letter makes reference to a letter dated December 19, 2003, from Mr. Vaccani to Ms. O’Brien. But a letter bearing that date is not included in the Response.

Even assuming *arguendo* that the January 5 letter constitutes an important development, it provides no justification for First Broadcasting's advancing a counterproposal to its own Original Proposal. It must be remembered that First Broadcasting's allotment plan was presented to Industry Canada *on the very day* that the Amended Proposal was presented to the FCC. As of that date, Industry Canada, of course, had not taken any action with respect to First Broadcasting's request. First Broadcasting is yet to explain why, if a change in Canadian policy was so important, First Broadcasting and Saga simply did not wait until that change had been effectuated before it filed its proposal. First Broadcasting, it must be remembered, was the party that started the process by filing the original proposal.

In conclusion, nothing in First Broadcasting's Response justifies the timing of First Broadcasting's Amended Proposal. Under the *Taccoa* policy, First Broadcasting's Amended Proposed should be DISMISSED.

**TRIPLE BOGEY, LLC, MCC RADIO, LLC
and KDUX ACQUISITION, LLC**

A large, stylized handwritten signature in black ink, appearing to read 'Matthew H. McCormick', is written over a horizontal line.

Matthew H. McCormick
Their Counsel

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March 19, 2004

CERTIFICATE OF SERVICE

I, Janice M Rosnick, do hereby certify that I have on this 19TH day of December, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing RESPONSE TO "REQUEST FOR EXPEDITED ACTION" to the following:

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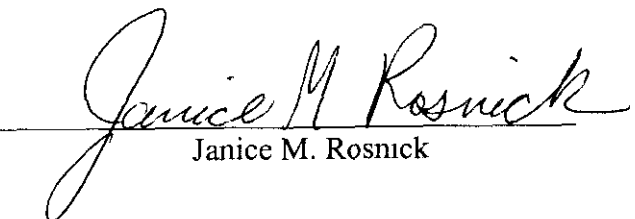
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